Insurance/
Reinsurance

5 February 2015

INSURANCE BULLETIN

Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

In this week's Bulletin:

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

Mikaela Stafrace, Special Counsel, mikaela.stafrace@hfw.com

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1. Regulation and legislation

1.1. PRA makes implementation of Solvency II a "top priority" (UK)

In a speech recently published by the Bank of England, Paul Fisher, the PRA's Deputy Head and Executive Director of Supervision stated that the successful implementation of Solvency II is a "top priority" for both the PRA and the Bank of England.

In the speech, the subject of which was regulation and the future of the insurance industry, Mr Fisher also noted that the UK insurance industry is in a good position as a result of the UK's individual capital adequacy standards (ICAS) framework and that the PRA will accordingly not be using Solvency II as an opportunity to raise capital requirements across the board.

The speech also contains interesting comment upon:

- The PRA's intended approach as regards the implementation of Solvency II, which is not to "gold plate" and to continue to be proportionate in its supervision of firms.
- The link between firms' capital and risk management.
- The introduction of the prudent person principle and the associated shift from quantitative to qualitative rules.
- The role of non-executive directors.

The full text of the speech can be found: http://www.bankofengland.co.uk/publications/Documents/speeches/2015/speech790.pdf.

For more information, please contact Ben Atkinson, Associate, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

1.2. FCA fines inter-broker executives for compliance and cultural failings (UK)

The FCA has for the first time issued fines to individuals in respect of LIBOR misconduct failings. On 22 January 2015, the FCA published final notices issued to former senior executives of Martins Brokers (UK) Limited, an inter-broker dealer.

The notices were in respect of compliance and cultural failings at Martins, which the FCA found had contributed to misconduct in respect of LIBOR, and which accordingly risked compromising the integrity of UK financial markets.

In May 2014, the FCA fined Martins £630,000 for LIBOR misconduct, finding that Martins had breached its Principles for Business and in particular Principle 5 (market conduct) and Principle 3 (management and control).

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BEN ATKINSON, ASSOCIATE

2. Market developments

2.1. Africa: developments in disaster risk management (Africa)

In 2014, the African Risk Capacity (ARC) insurance company was set up as a specialised agency of the African Union to help its Member States address the effects of unique climate issues on the African continent, improve planning for and responding to extreme weather events and thereby protect populations vulnerable to food shortages suffered as a consequence.

ARC and its affiliated mutual insurance company developed a catastrophe insurance model and January 2015 saw a payout of USD$25 million in drought insurance claims to three countries in the Sahel – a semiarid transitional zone of western and north-central Africa which extends from Senegal in the west to The Sudan in the east. The three countries, Mauritania, Niger and Senegal, paid a total premium of USD$8 million and will use the payout to initiate an early programme of drought response which itself is formulated on pre-endorsed emergency plans.

The payout was described as a *"milestone in government leadership and financial innovation for emergency response across the Sahel"* by the UN regional humanitarian co-ordinator for the Sahel, Robert Piper. Mr. Piper continued, *"ARC's information and action is spearheading what will be a substantial global emergency response over the coming months to mitigate what could otherwise become a major food crisis."*

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LUCINDA RUTTER, ASSOCIATE

In 2014, Kenya, Mauritania, Niger and Senegal became the first African countries to purchase drought insurance based on parametric statistics. This was seen as significant move toward changing African concepts of disaster response. Further, 2016 will see the first coverage availability for floods and tropical cyclones.

Country-level contingency plans based on existing government programmes are being developed by ARC and its member states. Payouts are made on the basis of calculations using ARC's in-house drought monitoring and loss calculation software, Africa RiskView. Before a payout is made, a final implementation plan must be submitted by the government for certification by ARC's governing board's peer review mechanism.

It is said that ARC has the potential to change disaster risk management in Africa – with the ability to mount a multibillion dollar portfolio, ARC could offer coverage to more than twenty countries by 2020. As described by the founding director general of ARC, Dr. Richard Wilcox, *"this is a transformative moment in African food security, demonstrating the potential for cost effective disaster financing."*

For more information, please contact Lucinda Rutter, Associate, on +44 (0)20 7264 8226, or lucinda.rutter@hfw.com, or your usual contact at HFW.


3. Court cases and arbitration

3.1. Reliance on Section 54 in seeking leave to join insurer – *Guild Insurance v Hepburn* (Australia)

This Court of Appeal judgment considers how Section 54 of the *Insurance Contracts Act* (ICA) may assist in obtaining leave to join an insurer as a party to proceedings.

Ms Hepburn alleged that she suffered injury as a result of treatment provided by her dentist, Dr White. Ms Hepburn sought leave to join Dr White's insurer, Guild, as a party to the proceedings (per s6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW)), as she was concerned that Dr White would not be able to satisfy a judgment entered in Ms Hepburn's favour. Dr White had retired from dental practice at the time of the proceedings.

In order to join Guild, Ms Hepburn had to establish (among other things) that Guild had issued a policy in which Dr White would be entitled to indemnity in respect of her alleged liability.

Dr White was not insured at the time the proceedings were filed. The Court was able to infer (based on a letter from the insurer and noting that the policy documents were not placed in evidence) that the relevant Guild policy at the time of Ms Hepburn's treatment was a "discovery" policy. This meant that Dr White's awareness of the potential liability to Ms Hepburn at the time of treatment, could trigger the operation of the policy.

Further, the fact that Dr White had not informed Guild of the potential liability during the currency of the policy could be remedied by Section 54 of the ICA. Section 54 provides, inter alia, that an insurer cannot refuse to pay a claim by virtue of an act or omission of the insured after the insurance contract is entered into. Instead, the insurer's

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SUSANNAH FRICKE, ASSOCIATE

liability is reduced by an amount that fairly reflects any prejudice suffered by the insurer as a result of the insured's act or omission.

With no evidence suggesting it suffered any prejudice due to Dr White's failure to notify, Guild was arguably required to indemnify. As such, Ms Hepburn was successful in obtaining leave to join the insurer.

The full text of this decision can be found at: www.caselaw.nsw.gov.au

For more information, please contact Susannah Fricke, Associate, on +61 (0)2 9320 4617, or susannah.fricke@hfw.com, or your usual contact at HFW.

3.2. Insured's business structure did not preclude insurable interest (England and Wales)

In this case, the insured (W) sought to recover from the insurer (G) losses arising from a fire at its premises. Amongst other arguments, G sought to avoid liability for the claim on the basis that W had no insurable interest in the insured property.

W was a company established to manage the property portfolio of its owner, S. The ostensible business structure was that property owned by S was let to W, which then sub-let that property to various tenants. W's position was that this arrangement applied to the insured property and that W accordingly had an insurable interest in the property as tenant. G argued that in fact the arrangement was "fiscally driven" and that the sums paid by W to S were not rent in a strict sense but were contractual consideration for the right to receive the rent roll from the tenants of S's properties. G argued that the insured property was outside this arrangement, because no rent from sub-letting was in fact generated in respect of it during the relevant period and that W therefore had no insurable interest in the property.

The Court accepted W's account of the arrangements, remarking that it was *"extraordinary that insurers should require [W] to satisfy some examination of its "business model" or show that its arrangements are not "fiscally driven""*. The Court, in holding that W did have an insurable interest in the insured property by virtue of the arrangements in question, noted that the purpose of the requirement that an insured have an insurable interest is to preclude the possibility of gambling, which rationale had no application in this case. The Court also noted that in the past insurers have generally only raised the question of insurable interest in questions of fraud and that insurable



interest was not an issue in which G had taken any interest (or to which G had drawn S's attention) until the claim was presented. The Court observed that there was nothing in the proposal forms or other correspondence to alert a potential customer or broker that it should consider this issue closely and perhaps take legal and accountancy advice before entering into a policy with G.

The case is also of interest for a discussion of the appropriate remedy in a case such as this. In this case, the Court held that on the basis that (somewhat unusually) the policy conferred upon W an express right to reinstatement, W was entitled to a declaration to that effect.

Finally, the case is of interest in its consideration of the "Wisniewski principle", which states that although cases are decided on the evidence, the Court is entitled to draw adverse inference from the unexplained absence of evidence from witnesses, or in the form of documents, which it would be reasonable to expect might be before the Court. The Court was invited to apply this principle by both sides and confirmed that it had borne the relevant factors in mind in reaching its decision.

A copy of the full judgment can be found here: http://www.bailii.org/ew/cases/EWHC/QB/2015/103.html

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4. HFW publications

4.1. Insurance Bill makes progress through legislative process (UK)

HFW have published a Briefing on the latest amendments which have been made to the Insurance Bill. Since publication of the Briefing, the Bill has been passed unanimously in the House of Commons (UK) and is now only waiting for Royal Assent to become law.

A copy of the Briefing can be found here: http://www.hfw.com/Insurance-Bill-makes-progress-through-UK-legislative-process-February-2015

For more information, please contact Richard Spiller, Partner, on +44 (0)20 7264 8770, or richard.spiller@hfw.com, or Will Reddie, Associate, on +44 (0)20 7264 8758, or william.reddie@hfw.com, or your usual contact at HFW.

Lawyers for international commerce hfw.com